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18 UNITED STATES DISTRICT COURT  
19 CENTRAL DISTRICT OF CALIFORNIA

20  
21 In re  
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23 CITY OF SAN BERNARDINO,  
24 CALIFORNIA,  
25  
26 Debtor.

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29 CITY OF SAN BERNARDINO,  
30 CALIFORNIA,  
31  
32 Plaintiff-Appellee,  
33  
34 v.  
35  
36 STATE OF CALIFORNIA; JOHN  
37 CHIANG, in his official capacity as State  
38 Controller of the State of California;  
39 OFFICE OF THE STATE  
40 CONTROLLER OF CALIFORNIA;  
41 MICHAEL COHEN, in his official  
42 capacity as the Director of the State of  
43 California Department of Finance;  
44 CALIFORNIA DEPARTMENT OF  
45 FINANCE,  
46  
47 Defendants-Appellants

58 Case No. 5:13-cv-01797-SJO

59 CALPERS' MOTION FOR LEAVE TO  
60 FILE BRIEF *AMICUS CURIAE* IN  
61 SUPPORT OF DEFENDANTS'  
62 APPEAL

63  
64 Assigned to Hon. S. James Otero

1           The California Public Employees' Retirement System ("CalPERS"), by and  
 2 through its undersigned attorneys, hereby moves this Court for leave to file the  
 3 attached brief as *amicus curiae*. The proposed brief is attached as Exhibit A.

4           CalPERS is an arm of the State of California, which implements and administers  
 5 the State's public employee retirement program—an aspect of the State's sovereignty.  
 6 CalPERS should be granted leave to file its brief because this appeal addresses issues  
 7 that are important to CalPERS and its approximate 1.7 million members. More  
 8 specifically, it addresses whether a municipality, which is a creature of the State, can  
 9 hale a State Agency into federal court against its will and then ask that court to require  
 10 a State Agency to turnover funds to a non-party debtor that such non-party debtor  
 11 never possessed. The Supreme Court has been express in its view that "the States'  
 12 immunity from suit is a fundamental aspect" of State sovereignty. *Alden v. Maine*, 527  
 13 U.S. 706, 713 (1999). In addition, this is the very first case that CalPERS is aware of  
 14 that asks a court to apply the Supreme Court's decision in *Central Virginia Community*  
 15 *College v. Katz*, 546 U.S. 356 (2006), to a municipal bankruptcy filed under chapter 9  
 16 of the Bankruptcy Code. Also, this appeal implicates issues relating to the degree of  
 17 control the State Agencies of California, like CalPERS, exercise over one of the State's  
 18 municipalities which seeks the protection of the bankruptcy court. These issues are of  
 19 significant importance to CalPERS, which acts to ensure the rights of its members and  
 20 retirees for numerous municipalities across the State. Additionally, leave should be  
 21 granted because the participation of CalPERS will not prejudice any party and may be  
 22 of assistance to the Court. Due to the importance of the sovereign immunity and  
 23 sovereignty issues, CalPERS' Board has authorized the filing of this *amicus curiae*  
 24 brief.

25           An individual or organization seeking leave to appear as *amicus curiae* need not  
 26 establish strict prerequisites. Rather, the court has broad discretion to permit *amicus*  
 27 participation and the applicant need only show "that his participation is useful to or  
 28 otherwise desirable to the court." *Congregation Etz Chaim v. City of Los Angeles*,

1 2009 WL 1293257, at \*5 n.4 (C.D. Cal. May 5, 2009) (quoting *Infineon Techs. N. Am.*  
 2 *Corp. v. Mosaid Techs., Inc.*, 2006 U.S. Dist. LEXIS 81506, 2006 WL 3050849 (N.D.  
 3 Cal. 2006)). “District courts frequently welcome amicus briefs from non-parties  
 4 concerning legal issues that have potential ramifications beyond the parties directly  
 5 involved or if the amicus has unique information or perspective that can help the court  
 6 beyond the help that the lawyers for the parties are able to provide.” *NGV Gaming,*  
 7 *Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)  
 8 (quotation omitted).

9 In bankruptcy appeals to district courts, district courts have applied Rule 29 of  
 10 the Federal Rules of Appellate Procedure by analogy to determine the procedures to be  
 11 followed by parties filing amicus briefs. *See Triad Int'l Maint. Corp. v. Southern Air*  
 12 *Transp., Inc.*, No. 2:04-CV-1200, 2005 WL 1917512, at \*1 (S.D. Ohio Aug. 10, 2005);  
 13 *In re Dow Corning Corp.*, 255 B.R. 445, 446 (E.D. Mich. 2000).

14 It is of importance to CalPERS that the bankruptcy court’s misapplication of the  
 15 United States Supreme Court’s decision in *Katz* and its erroneous views regarding the  
 16 Tenth Amendment are reversed. In 1945, the City of San Bernardino elected to  
 17 participate in the California State Retirement System, subject to the provisions of the  
 18 State Employees’ Retirement Act. The City’s obligations are defined by the Public  
 19 Employees’ Retirement Law (the “PERL”), Cal. Gov. Code § 20000 *et. seq.* Article  
 20 XVI, section 17 of the California Constitution mandates that the CalPERS Board of  
 21 Administration ensure the rights of CalPERS members and retirees to their full earned  
 22 benefits. *City of Oakland v. Pub. Emps. Ret. Sys.*, 95 Cal. App. 4th 29, 39 (2002).  
 23 Thus, CalPERS, like its sister agencies involved in this appeal, performs essential  
 24 sovereign functions that are prescribed by law. *See* Cal. Gov. Code § 20002 (CalPERS  
 25 “is a unit of the State and Consumer Service Agency”); *Feinstein v. Lewis*, 477 F.  
 26 Supp. 1256, 1261 (S.D.N.Y. 1979) (quoting ERISA’s legislative history noting issues  
 27 relating to state pensions are “are questions of state and local sovereignty [in which]  
 28 the Federal Government should not interfere.”), *aff’d* 622 F.2d 573 (2d Cir. 1980);

1 *Arya v. CalPERS*, -- F. Supp.2d --, 2013 WL 1858422, at \*8 (E.D. Cal. May 2, 2013)  
2 (finding CalPERS enjoys sovereign immunity).

3 The effect of this Court's ruling is not limited to the City of San Bernardino. It  
4 establishes precedent in an unsettled area of law that may be applied to other chapter 9  
5 cases in this State and across the nation. For this reason, CalPERS filed a brief as  
6 *amicus curiae* that was considered by the bankruptcy court in connection with the  
7 decision from which the Defendants are now appealing. *See* ER 217-83. As described  
8 in CalPERS' proposed *amicus* brief, it is imperative that state agencies, like CalPERS,  
9 be immune from suit in order for chapter 9 to function as Congress intended.  
10 CalPERS submits that its proposed brief raises important issues and presents a unique  
11 perspective, both of which will assist the Court in deciding this appeal.

12 For the foregoing reasons, CalPERS requests that this Court grant CalPERS  
13 leave to file the accompanying brief in support of Defendants-Appellants. In addition,  
14 to the extent this Court would find it helpful, CalPERS respectfully requests an  
15 opportunity to participate in oral argument on appeal. *See* Fed. R. App. P. 29(g).

16 The undersigned counsel certifies that no other party's counsel authored the  
17 attached *amicus curiae* brief in whole or in part, no other party or party's counsel  
18 contributed money intended to fund this brief, and no other person contributed money  
19 that was intended to fund the preparing or submitting of this brief. *See* Fed. R. App. P.  
20 29(c)(5)(A)-(C).

21  
22 Respectfully submitted,

23 Michael J. Gearin (pro hac vice)  
24 Michael B. Lubic  
Michael K. Ryan (pro hac vice)  
K&L GATES LLP

25 Dated: October 31, 2013

26 By: /s/ Michael B. Lubic  
27 Michael B. Lubic  
28 Attorneys for California Public  
Employees' Retirement System

**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is K&L GATES LLP, 10100 Santa Monica Boulevard, 7th Floor, Los Angeles, California 90067.

On October 31, 2013, I served the foregoing document(s) described as follows:

**CALPERS' MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS' APPEAL**

- Via the CM/ECF system of the United States District Court, Central District of California.
- BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California 90067, addressed as set forth below.

James F. Penman  
Don A. DiMichele  
Jolena E. Grider  
Office of the City Attorney  
300 North D Street, 6th Floor  
San Bernardino, CA 92418

- FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 31, 2013, at Los Angeles, California.



Jonathan Randolph